Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-257

In the Supreme Court of the United States

OCTOBER TERM, 1975

LESLIE H. BAKER, JR., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO DISMISS AND MEMORANDUM IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Pursuant to Rule 16(1)(a) of the Rules of this Court, appellee moves to dismiss this appeal. Treating the appeal as a petition for a writ of certiorari pursuant to 28 U.S.C. 2103, the petition should be denied.

1. The sole question presented is whether brokerage and related expenditures incurred by appellant in the purchase and sale of securities as a non-dealer are deductible for federal income tax purposes.

The decision below held that such costs are capital expenditures within the meaning of Section 263 of the Internal Revenue Code of 1954, to be added to the basis of the securities purchased and deducted from the amounts realized upon their sale.

During the years 1969 and 1970, appellant, who was not a dealer in securities, engaged in transactions in securities through an account with a brokerage firm. On his federal income tax returns for those years, appellant deducted brokerage fees and commissions on his securities transactions (J.S. App. 13-14). On audit, the Commissioner of Internal Revenue disallowed the claimed deductions. In this refund suit, the district court dismissed appellant's suit (J.S. App. 10-11), and the court of appeals affirmed *per curiam* (J.S. App. 11).

This case does not come within any statutory provision allowing an appeal of a decision of a court of appeals to this Court. See 28 U.S.C. 1252 and 1254(2). The appeal should therefore be dismissed.

2. Treating the appeal as a petition for a writ of certiorari pursuant to 28 U.S.C. 2103, there is no basis for further review. It is well settled by the decisions of this Court that brokerage fees and commissions paid by a non-dealer in securities upon the purchase of securities are to be added to the basis upon purchase, and any such costs paid upon the sale of securities are to be offset against the amount realized upon their sale. See *Woodward* v. *Commissioner*, 397 U.S. 572, 574-575; *Helvering* v. *Winmill*, 305 U.S. 79; *Spreckels* v. *Commissioner*, 315 U.S. 626.

It is respectfully submitted that the appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari, the petition should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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